MAR 25 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1067

REGENCY ELECTRONICS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
and
INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, AFL-CIO, CLC,
Respondents.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The briefs of the Board[1] ("Bd. Br.") and the Union ("U. Br.") filed in opposition to the Company's Petition for a Writ of Certiorari ("Co. Pet.") are permeated with the philosophy that courts, and specifically this Court, must approve any action by the Board in deference to administrative discretion. However, the Board has not yet been granted any such legislative or judicial carte blanche to ignore applicable decisions of this Court or to ignore the dictates of the Administrative Procedure Act, 5 U.S.C. §§500-706 (1975) ("APA").

1 The designations of the parties and other abbreviations are the same as those utilized in the Company's Petition for a Writ of Certiorari.

ARGUMENT

I. The *Allied* Rule is Invalid and its Application in this Case Improper.

In its Petition, the Company argues that the Board announced the *Allied* rule in the adjudicatory proceeding of *Allied Electric Products, Inc.*, 109 N.L.R.B. 1270 (1954) as a rule of general applicability and future effect. Thus, it was improper to apply the *Allied* rule in this case because the rule was not promulgated pursuant to the rule making provisions of the APA. (Co. Pet. 9-13) The Union does not challenge this argument. Rather, it states the issue is not "worthy of consideration" by this Court. (U. Br. 5) Such a casual approach to the Board's consistent refusal to follow the APA is echoed in the Board's brief.

The Board does not refute the fact that the *Allied* rule was announced in 1954 as a *new rule* of *general applicability* and *future effect*. The Board does not refute the fact that the APA defines such an "announcement" as a rule which must be promulgated pursuant to the APA. The Board offers no justification for its application of the unpromulgated *Allied* rule in this case as a rule of general applicability.

The only substantive argument urged by the Board is that the choice between rule making and adjudication lies in the first instance within the Board's discretion. (Bd. Br. 6) The Company agrees and so stated in its Petition. (Co. Pet. 9) What the Board fails to recognize is that it has discretion *only* to decide whether to proceed by a general rule or by ad hoc adjudication. If the Board decides to announce a general rule, it may only do so by promulgating the rule pursuant to the APA. The Board *does not* have the discretion to promulgate a general rule in an adjudicatory proceeding. This is exactly what the Board attempted to do with its *Excelsior* rule, an approach which was condemned by this Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

The single most significant aspect of the Board's brief is that it proves the Company's contention that the Board intends to continue ignoring both the decisions of this Court in *Wyman-Gordon* and *Morton v. Ruiz*,[2] 415 U.S. 199 (1974),

2 The Board's statement of the basis upon which this Court decided Ruiz is incorrect. (Bd. Br. 6 n. 4) Even if the Bureau of Indian Affairs had announced its rule in an adjudication rather than inserting it in its policy manual, it nevertheless was a rule of general applicability and future effect and the result in Ruiz would have been the same. This Court repeatedly stressed that the BIA's rule should have been promulgated pursuant to the APA. (415 U.S. at 231-36)

as well as the dictates of the APA. It must be acknowledged that the *Wyman-Gordon* decision expressed no preference for general rules over ad hoc adjudication. It is equally clear, however, that *Wyman-Gordon* requires that if an administrative agency decides to announce a rule of general applicability and future effect it may only do so by promulgating the rule pursuant to the APA. Note, *Rule-Making and Adjudication in Administrative Policy Making:* NLRB v. Wyman-Gordon Co., 11 B.C. Ind. & Com. L. Rev. 64 (1969). The Board erroneously combines these two principles into a single proposition that the Board, unlike every other administrative agency, can announce a rule of general applicability and future effect in an adjudicatory proceeding. Unlike *Wyman-Gordon*[3] or *H. & F. Binch Co. v. NLRB*, 456 F. 2d 357 (2nd Cir. 1972),[4] this is an appropriate case for this Court to administer the "one kind of medicine the Board will have no difficulty in understanding." (456 F. 2d at 365)

II. The Board Failed to State the Basis for its Order or Make Sufficient Findings.

Neither the Board nor the Union have responded to the Company's argument on this issue. Thus, the Board's failure in this case to comply with the dictates of *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) stands unchallenged.

III. The Decision of the Court of Appeals in *Regency II* is in Direct Conflict with this Court's *Savair* Decision.

In its Petition, the Company argues that the Union's use of charter membership cards violated this Court's proscription against contingent waivers of initiation fees. *NLRB v.*

3 As a matter of procedure, the Board's result was affirmed even though an unpromulgated, and thus invalid, rule was involved.

4 Proceeding by ad hoc adjudication, rather than rule making, deemed appropriate.

Savair Manufacturing Co., 414 U.S. 270 (1973). (Co. Pet. 15-17) The Board and the Union attempt to avoid meeting this argument by alluding to the Union's leaflet distributed to the Company's employees on March 9, 1972. (Bd. Br. 5, 7) (U. Br. 3-5) However, neither the Board nor the Union explain how that leaflet removed the concerns expressed in *Savair*. By the time the leaflet was distributed, as many as 50 employees had been charter members for over three months. For over three months those charter members had painted a false portrait of employee support for the Union. For over three months a moral obligation to vote for the Union had been engrained in the charter members. A leaflet distributed at the height of an election campaign when the employees were being inundated with propaganda, simply cannot erase the harmful effects of the Union's admitted *Savair* violation.

The *Savair* decision suggests a way of dramatizing the inadequacy of the Union's March 9 leaflet:

> "An employer who promises to increase the fringe benefits by $10 for each employee who votes against the union, if the union loses the election, would cross the forbidden line under our decisions." (414 U.S. at 278)[5]

If the Company in this case had engaged in conduct similar to the Union's, it too would have crossed the "forbidden line." For example, assume the Company had decided to give all employees a $10.00 bonus before it had any knowledge of union activity. The Company thus had an established bonus policy which could have been legally implemented even after the Company learned of the union activity.[6]

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5 Legal commentators have suggested that this statement and the accompanying discussion by the Court form the main basis for the Savair decision, *i.e.*, a union should be forbidden to dispense benefits in order to "buy" votes just as employers are forbidden. *See, e.g.*, Smither, *Does the Goalpost Move When Employers Kick About Union Misconduct During Elections?*, 25 Lab. L.J. 578 (1974); Note, 41 Brooklyn L.R. 153 (1974); and Note, 6 St. Mary's L.J. 250 (1974).

6 This hypothetical Company policy would thus be like the Union's "established policy" of exempting all employees from the payment of initiation fees, as asserted and relied upon by the Board (Bd. Br. 4) and the Union (U. Br. 5, 6). The Company *does not* contend that such a policy violates Savair. What the Company *does* contend is that the Union's use of charter membership cards did not reflect that unannounced Union policy and thus did violate Savair. Further, the Union's reliance upon its inconsistent "established policy" at best serves to demonstrate that the charter membership cards constituted a blatant misrepresentation of that policy in violation of NLRB v. Gorbea, Perez & Morell, S. en C., 328 F. 2d 679 (1st Cir. 1964). Even the dissenting Justices in Savair would have found the Union's conduct in this case objectionable. (414 U.S. at 283)

Assume further, however, that once the Union started its organizing effort, the Company decided to illegally implement its otherwise lawful bonus through the guise of Company charter memberships and, three months prior to the election, distributed the following cards to certain pro-Company employees:

FRONT

COMPANY CHARTER MEMBER.
ENTITLED TO $10.00
THIS CARD IS VALUABLE—
KEEP IN YOUR WALLET.

BACK

COMPANY CHARTER
MEMBERSHIP CARD

This is to certify that Jane Doe has, during an organizational drive at the Company, signed a Company membership card signifying her desire to be a member of the Company team. In bestowing membership on her, she is hereby promised $10.00 and will be listed as a Company Charter Member.

(The Union's charter membership card is at pages 6 and 7 of the Company's Petition.)

Also assume that as the election campaign drew to a close, the Company distributed a leaflet in the following form:

Question: If I haven't signed a Company membership card, can I still vote for the Company?

Answer: Yes you can. Signing a card has nothing to do with how you vote. Your vote will be cast in secret and you can vote for the Company regardless of whether or not you signed a card.

Question: Will I receive $10.00 if the Union is voted out?

Answer: Absolutely yes! Anyone presently working at the Company is hereby guaranteed they will receive $10.00.

(Similar questions and answers in the Union's leaflet are at page 16 nn. 6 and 7 of the Company's Petition.)

Even if this subsequent leaflet somehow explained the meaning of the Company charter membership cards, it would be insufficient to pull the Company back across the forbidden line. Actually, the leaflet only compounds the offense. What it really tells the employees is that it is still not too late for non-charter members to join the Company team and receive their $10.00.

The Union's charter membership cards and the leaflet distributed on March 9, 1972, had this same effect. The Board in this case should have followed the *Savair* decision and honored "the right of those who oppose a union as well as those who favor it." (414 U.S. at 278)

CONCLUSION

For the reasons stated in the petition and this reply brief, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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